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IN THE

Supreme Court of the United States

October Term, 1969

No. 957

EUGENIO HERNANDEZ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

FRANK S. HOGAN
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
RE 2-7300

HAROLD ROLAND SHAPIRO
Assistant District Attorney
Of Counsel

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Statement

The petitioner seeks certiorari to review a judgment of the Court of Appeals of the State of New York (*People* v. *Hernandez,* 25 N.Y. 2d 869), unanimously affirming an order of the Appellate Division, First Department (30 A.D. 2d 659), which unanimously affirmed as to the petitioner a judgment rendered March 13, 1967, in the Supreme Court, New York County (POSTEL, J., and a jury), convicting petitioner, after trial, of the felonies of POSSESSING NARCOTICS WITH INTENT TO SELL, and of CONSPIRING TO SELL NARCOTICS, and sentencing him to serve a term of not less than five nor more than eight years in State Prison, and suspending sentence on the conspiracy count (Min. of Sentence, p. 20).*

* References are to the pages of the typewritten record of the trial.

By consent, execution has been stayed and the defendant allowed on $25,000 bail pending disposition of the petition, with the stipulation that New York was not conceding merit in the petition.

The Proceedings Below

The petitioner Hernandez and his co-defendants Guerra and Rodriguez were convicted, after trial, at which he took the stand, of two counts, charging felonious possession of narcotics (marijuana) with intent to sell, and conspiracy feloniously to sell narcotics to one Bermudez. The Appellate Division reversed as to Guerra and Rodriguez and ordered a new trial as to them on the ground that self-incriminating statements they made to Detective Bermudez should have been excluded because they were not given notice of intent to use against them on the trial, under Code Crim. Proc. §813-f, or warned of their rights under *Miranda* when arrested. The judgment as to the petitioner was affirmed, the court holding that the case against him was clear and not vulnerable to the arguments available to his co-defendants, and also that petitioner's own statements were made long before he was taken into custody (*People* v. *Guerra, Rodriguez and Hernandez,* 30 A.D. 2d 659). Guerra and Rodriguez have pleaded guilty and so hasc a third conspirator, Castellanos, whose case had been severed because he was a fugitive from justice.

The Memorandum on affirmance by the Court of Appeals declares, in part (25 N.Y. 2d 869):

> "In the Court of Appeals defendant Hernandez argued that his constitutional rights were violated by

the denial of motions made by him for a severance and by the introduction against him of statements which were made to Bermudez by Guerra and Rodriguez in his absence and after their arrest and the alleged "arrest" of Bermudez, and in which he was named as the alleged "boss" of the enterprise to sell narcotics. The People argued that the conspiracy had not ended at the time the statements were made and that they were admissible as against defendant Hernandez as statements made by conspirators concerning an absent conspirator, while the conspiracy was continuing and in furtherance of it. Judgment affirmed; no opinion. All concur."

There Is No Merit to the Petition

The petitioner, noting that the convictions of his co-defendants Guerra and Rodriguez were reversed on the ground that their self-incriminating statements were made in the absence of the requisite *Miranda* warnings, and that some of those statements were prejudicial to him, *propounds as the question presented for review* (his p. 2) whether he was therefore not also entitled to have his own convictions reversed.

Since the *Miranda* warnings are based on the Fifth Amendment privilege against self-incrimination (*Miranda* v. *Arizona,* 384 U.S. 436, 457, 470), the petitioner's claim insofar as it is predicated on the reversal of their convictions for failure to give them *Miranda* warnings, seeks to latch on to a privilege personal to themselves and which may not be vicariously asserted, and the petitioner has no standing to assert it. *Rogers* v. *United States,* 340 U.S. 367, quoting *United States* v. *Murdock,* 281 U.S. 141, 148,

Hale v. *Henkel,* 201 U.S. 436, 469, and *McAllister* v. *Henkel,* 201 U.S. 90, 91; *Harrison* v. *United States,* 387 F.2d 203, 214 (CCA, DC) and cases cited; *Lopez* v. *Burke,* 413 F.2d 992, 994 (CCA, 7th); *Bargerian* v. *Cliff,* 300 Fed. Supp., 8, 14, and cases cited; and see, *Alderman* v. *United States,* 394 U.S. 165, 171-2, that "Fourth Amendment rights are personal rights which *like some other constitutional rights,* may not be vicariously asserted" (emphasis supplied), with the part-dissent, part concurrence at 205 conceding the Fifth Amendment privilege to be available only to the person whose privilege has been violated.

In *Alderman* v. *United States, supra,* 394 U.S. 165, 171, 172, this Court, dealing with Fourth Amendment rights, stated that the suppression of the product of a violation of such rights can be successfully urged only by those whose rights were violated, and "not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing." Referring to these and other rights which may not be vicariously asserted, this Court said (at p.):

> "The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of the probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."

Even Mr. Justice FORTAS, in his part-concurrence, part-dissent, at p. 205, while contending that under certain circumstances a defendant should have the right to object to the use of evidence obtained in violation of Fourth Amendment rights, acknowledged that as to evidence obtained in violation of the *Fifth Amendment privilege against self-incrimination,* "* * * [only] the person whose right has been violated can claim the protection of that privilege [and cases cited]." As this Court declared in *Rogers* v. *United States,* 340 U.S. 367, *supra,* "* * * the decisions of this Court are explicit in holding that the privilege against self-incrimination 'is solely for the benefit of the witness' [*United States* v. *Murdock,* 284 U.S. 141, 148 (1931)], and 'is purely a personal privilege of the witness' [*Hale* v. *Henkel,* 201 U.S. 43, 69 (1906); *McAllister* v. *Henkel,* 201 U.S. 90, 91 (1906)]."

As regards the petitioner's other claims, we reiterate what we pointed out below, as set forth by the Court of Appeals, and which the New York courts necessarily *found as a fact on the instant facts*: "that the conspiracy had not ended at the time the statements were made and that they were admissible as against defendant Hernandez as statements made by conspirators concerning an absent conspirator while the conspiracy was continuing and in furtherance of it." (see p. 3, *supra*).

As the trial evidence showed, Detective Bermudez, pretending to be a prospect looking to make a large buy of marijuana, contacted the co-defendant Rodriguez, who finally made contact with co-defendant Guerra, after which Guerra went off (144-157), and—(contrary to the petition-

er's claim here, at p. 3) after Guerra had a talk with the petitioner Hernandez (157, 451)—brought in "Pepe" Castellanos (whose case was severed because he could not be found) who, as well as Guerra, *promised Bermudez 16 pounds of "pot" that day,* at $100 a pound, 20 pounds more that night, and Guerra promising more thereafter from two 500 pound shipments which he was expecting from California the next week (157-160). Taken by Castellanos to an apartment on Washington Heights, Bermudez was shown, by the defendants, the merchandise, was asked by Rodriguez and Guerra to test it, and upon his selecting eight "bricks" weighing *16 pounds,* which remained in the apartment, went downstairs to his car, and, *counting out $1600 to Rodriguez,*—a signal to his fellow officers,—he and Rodriguez were taken into custody and, soon thereafter, Guerra; after which the "pot" in the apartment was seized by the detectives (160-165).

Following the arrest of the defendants Garcia and Rodriguez, and of Castellanos, and also the "arrest" of Bermudez, Bermudez told Rodriguez and Garcia that he was going to offer the police a bribe to buy himself out of the arrest, because otherwise he would lose his supposed liquor license, whereupon the two asked him to try to get them out with him (172). Upon Detective Watson advising that it would cost $7000 to set them all free, both defendants directed Bermudez to *turn over the $1600* now in Rodriguez' pocket, and Bermudez' $2400 which he had held for further purchases and was still in his car trunk, to free the three (but that Castellanos must stay) and promised Bermudez that he would be paid back from the "load" "we're getting" "next week," and that "yours comes right off the top"

(174-6). Thereupon, Garcia, believing with Rodriguez that they and Bermudez had managed to cut themselves loose from the police by means of the moneys their customer had thus paid without any narcotics to show for it, then propositioned one of the detectives, whether, if they raised another $1300, would Castellanos also be cut loose, since the detectives could keep the $1600 "pot" and another pound of marijuana they found, thus satisfying the figure of $7000 (176-8). The co-defendants Rodriguez and Guerra left with that understanding.

Obviously hoping to track down the big "load" expected "next week," and to catch the bigwig in the conspiracy, Bermudez asked the defendants Guerra and Rodriguez *what was going to be now?* (178)—a question which to these defendants meant, as obviously, What do we do now that our customer still is without the $1600 worth of pot we sold him, and the $1600 and $2400 cash which our customer Bermudez parlayed for our freedom, have been turned over to the police, and that we can free Castellanos for $1300 more?—and We must report at once to the boss, so that *the customer can be taken care of, as we promised!* Guerra responded, "Let's see the boss" (178). Further responding to the question, he and Rodriguez, believing themselves to be as free as birds on the wing, *took Bermudez* to the restaurant of the petitioner *Hernandez,* where they descended with Hernandez through a trap door, to a kitchen below (178-180).

The antecedent happenings were part of the *res gestae* and gave connection and meaning and clarification to Garcia's ensuing conversation with the petitioner Hernandez, and Hernandez' conversations with Bermudez, and

by the references and allusions in the Hernandez conversations to what went before, established Hernandez' prior knowledge of and involvement and participation in and ratification of, and direction of, the criminal enterprise; establishing through his own admissions his constructive possession and control with the others of the illegally possessed marijuana, with intent to sell, and his conspiracy with them to sell marijuana to Bermudez (Code Crim. Proc. §395; *People* v. *Cuozzo,* 292 N.Y. 85, 92). For, on Garcia *reporting* to him what had "happened," and that Bermudez "is the guy that got *the 16 pounds,*" that "we" were arrested—were grabbed—in "*the* apartment"—that Bermudez had given them $4000 "to cut us loose" so that "we" could get out of "the apartment," and that for $1400 "we can get him [Castellanos] loose (180)," Hernandez *showed instant recognition and response* as the boss of the operation by figuring out that it required only "1300," and saying, "You got it. Get him out for 13" (180, 287), and upon Garcia confirming, "Yes we can get him out for thirteen hundred," that "All we need is 13 more (180-1, 258), Hernandez showed his further knowledge, participation and control of the operation and the drugs and of the premises where the drugs were found and seized, by directing Garcia, in aid of freeing Castellanos, to "go to *the* apartment," "back to *the* house," and—indicative of dominion of the premises—ordering them to "check and see" "if they were still there, and, *thanking Bermudez for what he had done, promised*—in redemption of the credit his men had extended and acknowledged as due him—*to take care of him "as soon as everything cools down," with 25 pounds* (181). Thereupon, on the defendant Garcia returning with the information

that nobody was there, and Bermudez then complaining, "Gee, my 4000!" Hernandez responded by admitting, "Look, *I lost $1600* on this *deal,*" thereby admitting his ownership of the drugs and his participation, and evidenced his obligations to his henchmen and his confirmation and ratification of their actions and his continuing responsibility to Bermudez as his customer, when he complained, "Plus I got to go for a lawyer and I got to go for bail money," and reassured him, "So take it easy. Don't worry. We'll —" (182). Further indicative of his guilt, and corroborative of Bermudez' testimony, was Hernandez' acknowledgment on cross-examination—after his initial efforts on the stand—that the defendants Rodriguez and Guerra had indeed spoken to him about putting up $1300 to *bribe the police* to free Castellanos (531).

Contrary to the petitioner Hernandez' claims, it is hornbook law that "The conspiracy does not necessarily end when the substantive crime which was its primary object has been committed, or when one or more of the conspirators have been arrested" (Vol. 15A, C.J.S. at p. 725), and that even "The withdrawal of some of the participants and the joining of the others does not terminate, or interrupt the continuity of, the conspiracy, or change the status of the other conspirators" (*ibid.*, 726; and see, *United States* v. *Cohen,* 197 F.2d 26, 29 (CCA 3rd 1952). Here what preceded the petitioner's confirmatory and ratifying conversations, admissions and transactions showed that the crimes were committed, and as connecting evidence, how Bermudez and the defendants Guerra and Rodriguez got to the petitioner Hernandez, and clothed the disembodied skeleton of such conversation with the flesh and blood of juridical meaning as aforesaid.

Krulewitch v. *United States*, 336 U. S. 440, relied on by Hernandez is distinguishable. It did not hold that an arrest must be the cut-off date beyond which a co-conspirator's statements are not binding on an absent defendant. It stated *inter alia* that the co-conspirator's statement, implying the petitioner's guilt, was made after the petitioner and the co-defendant had been arrested, and that the facts showed the conspiracy to have long since ended, *and* pointed out that the Government had "made no effort whatever to show" that the statement *"made no effort whatever to show"* that the statement *"was made with his authority"* (442). Here, by contrast the co-conspirators' statements, made shortly after their arrest, were *statements-in-action*, and were indeed *ratified and confirmed and adopted* by the petitioner, by his own admissions and transactions which ensued when they brought their customer forthwith to him.

Unlike the usual situation where a taking into custody necessarily scotches the conspiracy, and where admissions in narrative form, given long after a termination of a conspiracy are offered to bind an absent co-defendant, here, it is submitted, the conspiracy had been vibrant prior to custody and showed itself to be "alive and kicking" during custody, in making an accommodation with the customer and the arresting officers, and showed its life force immediately after Rodriguez and Garcia felt themselves wholly free again, through their words and actions which became juridically operative upon the petitioner Hernandez who showed himself to be the man-behind-the-scenes *through his own responding words-in-action*, which had the effect of acknowledging, adopting and ratifying them

and thus establishing *nunc pro tunc* his guilt in the possession with intent to sell (first count) and his headship of the conspiracy to sell (third count). See, *State* v. *Page*, 251 Louisiana 810, 206 Southern 2d 503, that a confession of a co-defendant made after arrest, out of the presence of the defendant, which is verbally assented to by the defendant after being repeated in his presence, is admissible against both defendants, citing 2 Underhill's Cr. Ev. §395, p. 1009 (5th ed.); 22 A, CJS, Crim. L., §769, p. 1159; 29 Am. Jur. 2d, Ev., §539, pp. 550-1. See, also, *People* v. *Storrs*, 207 N.Y. 147, 159, quoting *Comm.* v. *Smith*, 151 Mass. 491, that conversations after a burning were still made during the pendency of the criminal enterprise; being "connected with acts done evidently to shield the conspirators from the consequences of their crime"; and to same effect, *Reed* v. *People*, 402 P. 2d 68 (Colo.).

In this posture, we submit that the *Bruton* rule concerning severance in certain circumstances where a confession by a co-defendant, made after the crime, is introduced in evidence (*Bruton* v. *United States*, 391 U.S. 123), does not govern here, since what we had here were words-in-action and deeds, by conspirators in the course of and in furtherance of the conspiracy, which were *confirmed and ratified, adopted and established, by Hernandez' own responses and directions, as being in furtherance of the conspiracy.* There was "no requirement that the conspiracy" [by the petitioner Hernandez] "be proved at the trial before the declarations" were "admitted, and the order in which evidence" was received was "within the court's discretion. *United States* v. *Sansone*, 231 Fed. 2d 887, 893 (CCA 2nd)." *United States* v. *Halpin*, 374 Fed. 2d 493 (CCA 7th, 1967).

Conspiracy is the classic situation for joinder of defendants for trial [*United States* v. *Wright*, 356 F.2d 261 (1966), cert. den. 385 U.S. 844, 861], and here, indeed, as seen, the antecedent transactions, confirmed and ratified by the petitioner, were plainly necessary and proper in establishing his connection with the conspiracy and the possession.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

HAROLD ROLAND SHAPIRO
Assistant District Attorney
Of Counsel